they are all actions for an equitable execution. The creditor has a claim against the trustee, who in turn has a right of exoneration from any liability incurred by him without fault in managing the estate. This right is not merely one of reimbursement, but the trustee is entitled to apply the income of the trust estate to discharge the claim. There is therefore no reason why the creditor may not, by an equitable execution, apply this right of exoneration to the satisfaction of his own claim. True, no general creditor of the trustee can get at this right of exoneration, but that is owing to its peculiar nature; it is a right against the trust estate solely for the purpose of satisfying that particular claim.

It does not appear in the principal case that the trustee was expressly authorized by the testator to carry on a business for the benefit of the trust estate; but though *Worrall* v. *Harford*, 8 Vesey, 4, which limited the right of recovery to liabilities incurred in such a business, was cited, it is perhaps too much to infer that the court meant to dissent from that and similar decisions. In the United States this limitation has been generally disregarded, and properly, for it is purely arbitrary and at the same time unjust. The principal case is, at all events, a long step towards a consistent doctrine.

RECENT CASES.

AGENCY — INDEPENDENT CONTRACTOR — NEGLIGENCE. — Through the negligence of an independent contractor employed by the defendant to tear down a building, part of a wall fell, damaging the plaintiff's building. *Held*, that the defendant is liable though he used due care in selecting a competent contractor. *Covington Bridge Co.* v. *Steinbrook*, 55 N. E. Rep. 618 (Ohio). See NOTES.

AGENCY — UNDISCLOSED PRINCIPAL — ELECTION. — *Held*, that an unsatisfied judgment against an agent, obtained in ignorance of the existence of his undisclosed principal, is no bar to a subsequent action against the principal. *Brown* v. *Reiman*, 62 N. Y. Supp. 663 (Sup. Ct., App. Div., Fourth Dept.).

There is very little authority on the point in this country. *Beymer* v. *Bonsall*, 79 Pa. St. 298, is probably in accord with the principal case, though the decision is not quite clear. The English courts, however, maintain the opposite view. *Priestley* v. *Fernie*, 3 H. & C. 977. While the present case is clearly correct in holding that the plaintiff could not make an election without knowing of his right against the principal, nevertheless recovery might well have been denied on the ground that the plaintiff's cause of action had become merged in the judgment against the agent. His right is really a single contractual claim on which by an anomaly he is allowed to proceed against either the agent or the principal; but as soon as this claim is turned into a judgment against one, it is gone, and there is no longer any basis for an action against the other. See *Kendall* v. *Hamilton*, 4 App. Cas. 504, 514.

AGENCY — WRONGFUL SALE — INNOCENT PURCHASER. — The plaintiff consigned goods to a retail grocer to sell on commission in the ordinary course of his business. The consignee immediately sold the entire stock for cash to the defendant, who had no notice of the agency. *Held*, that the plaintiff can maintain replevin. *Romeo* v. *Martucci*, 45 Atl. Rep. 1 & 99 (Conn.).

Apparently the precise point here involved has never before been decided, but, on principle, the case can hardly be supported. The court relies upon the well-settled law that a factor cannot pass the title of his principal by a pledge or barter. *Kinder* v. *Shaw*, 2 Mass. 397; *Guneiro* v. *Peile*, 3 B. & Ald. 616. These decisions are, however, based on the fact that such acts are not naturally incident to a power of sale, and hence no authority can be implied. But in the principal case there is no need for an implied authority, since the consignee has an express power to sell. The limitation of this authority to sales at retail should be no more effective against a purchaser ignorant

of the restriction than would instructions to sell only at a certain price. *Whitehead* v. *Tuckett*, 15 East, 400. Moreover, where the decisions are not expressly binding, it seems that the court might well, by protecting the innocent purchaser, reach the result which is proved by the factor's acts to be commercially desirable.

BANKRUPTCY — CORPORATIONS — ACT OF BANKRUPTCY. — *Held*, that an application by an insolvent corporation for the appointment of a receiver under a state law is not an act of bankruptcy. *In re Empire Metallic Bedstead Co.*, 98 Fed. Rep. 981 (C. C. A., Second Cir.).

Under the Bankruptcy Act of 1867 the opposite result was reached. *In re Bininger*, Fed. Cas. 1420; Lowell, Bankr. 25. The decisions under the Act of 1898 are conflicting. In accord with the principal case, see *In re Baker Ricketson Co.*, 97 Fed. Rep. 489 (Dist. Ct., Mass.). *Contra*, *Mather* v. *Coe*, 92 Fed. Rep. 333 (Dist. Ct., Ohio). The earlier Act provided in § 39 that a person may be declared an involuntary bankrupt "if he suffers his property to be taken on judicial process with intent to give a preference." The application for a dissolution was held to be a judicial process. The present Act in § 3 d (3) contains a substantially similar provision declaring it an act of bankruptcy "to suffer any creditor to obtain a preference through legal proceedings." Therefore an application for the appointment of a receiver ought to be considered an act of bankruptcy if the provisions of the state insolvency law give precedence to claims of creditors other than those entitled thereto by the national Act, for in that case the application would result in giving preferences. Since this appears to be true under the New York statutes, 1 Rev. Stat., 2 ed., 669, the principal case seems incorrect.

BANKRUPTCY — PREFERENCES — TRANSFERS PURSUANT TO PRIOR CONTRACT. — The plaintiff advanced money to the defendant's assignor in bankruptcy, and the latter contracted to transfer certain personal property to the plaintiff unless the loans were repaid within a specified time. The debtor failed to pay, and, within four months before he filed a petition in bankruptcy, transferred the property to the plaintiff. *Held*, that the conveyance is not a preference. *Subin* v. *Camp*, 98 Fed. Rep. 974 (Cir. Ct., Oreg.).

The decision seems incorrect. Both the Bankruptcy Act of 1867 and that of 1898 declare that conveyances amounting to preferences are void if made within four months before the filing of the petition. Act of 1898, § 60 b; Act of 1867, § 35. Nevertheless, under the earlier Act it was held that a transfer, though within the four months, was valid if made according to a prior agreement which equity would specifically enforce. *In re Jackson Iron Mfg. Co.*, 15 N. B. R. 438; *Douglas* v. *Vogeler*, 6 Fed. Rep. 53. The Act of 1898, § 70 (3), defines the property which rests in the assignee as that on which the bankrupt's creditors could levy. But this should not alter the law, for property is not subject to attachment if an agreement by the debtor to convey it can be specifically enforced. 2 Freem. Judg. § 397. Equity would not have enforced the contract in the principal case, however, since its subject-matter is personality, and, therefore, the transfer to the plaintiff should have been held a preference and void. *In re Sheridan*, 98 Fed. Rep. 406.

CARRIERS — NEGLIGENCE — PERSONS NOT PASSENGERS. — The plaintiff, who had boarded a train for the purpose of speaking to a passenger, was injured by the negligence of the railway. *Held*, that the company is not liable, since its employees had no notice of her presence. *Bullock* v. *Houston, etc. Ry. Co.*, 55 S. W. Rep. 184 (Tex., Civ. App.).

By the weight of authority, the carrier is under a duty, irrespective of notice, to use the same care toward persons for whom the passenger may demand access to the train that he must use toward the passenger. *Little Rock, etc. R. R. Co.* v. *Lawton*, 55 Ark. 428; *Louisville, etc. Ry. Co.* v. *Crunk*, 119 Ind. 542. The principal case is a novel attempt to include mere social visitors among such persons. The right has not, however, been extended by the decisions beyond cases where the assistance of the third person is reasonably necessary to aid the passenger to enter or leave the car, since the public duty of the carrier covers only such matters as are incidental to the carriage. *Doss* v. *Missouri, etc. Ry. Co.*, 59 Mo. 27; *Whitbey* v. *Southern Ry. Co.*, 122 N. C. 987. Here, therefore, there should be no more than the ordinary liability of a landowner, and, as there is, generally speaking, no duty to anticipate trespasses, the decision is correct. *Palmer* v. *Northern Pacific R. R. Co.*, 37 Minn. 223.

CARRIERS — PUBLIC DUTY — EXCLUSIVE PRIVILEGES. — *Held*, that a common carrier may grant to a hackman the exclusive privilege of soliciting patronage within its station. *Godbout* v. *Saint Paul, etc. Co.*, 81 N. W. Rep. 835 (Minn.). See NOTES.

CARRIERS — TICKETS — MISTAKE. — The defendant's ticket agent by mistake gave the plaintiff, instead of an unlimited ticket, one which was void after a certain date. After that time the conductor refused the ticket, and ejected the plaintiff upon his failure to pay fare. *Held*, that the plaintiff may recover for being ejected. *Walker* v. *Price*, 59 Pac. Rep. 1102 (Kan., C. A.).

The doctrine of this case has some support. *Kansas, etc. Ry. Co.* v. *Riley*, 68 Miss. 675; *Georgia Ry. Co.* v. *Dougherty*, 86 Ga. 744. The great weight of authority is, however, that a ticket when presented on the train is governed by the terms on its face, regardless of the mistake of the selling agent. *Bradshaw* v. *South Boston R. R. Co.*, 135 Mass. 407; *Townsend* v. *New York, etc. R R. Co.*, 56 N. Y. 295. This seems the sounder view, for the carrier in issuing the ticket merely undertakes to accept it according to its terms in discharge of the holder's common law obligation to pay fare. Therefore, when a ticket is presented which is on its face invalid, the holder has no right to ride without paying on the train, and the company should be justified in ejecting him. The purchaser, of course, has his remedy either in tort for the negligent misrepresentation of the ticket agent, or in contract for breach of the implied warranty. *Frederick* v. *Marquette, etc. R. R. Co.*, 37 Mich. 342; Hutch. Carriers, 2d ed., 580 k.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAXATION OF BROKERS. — A municipal ordinance imposed a license tax on brokers of merchandise. The defendant was a broker engaged exclusively in selling goods which were in another state. *Held*, that as to him the tax is void as a regulation of interstate commerce. *Adams* v. *Richmond*, 34 S. E. Rep. 967 (Va.).

Decisions similar to that in the principal case have been made by the United States Supreme Court in regard to taxes on travelling salesmen. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Brennan* v. *Titusville*, 153 U. S. 489. In another case, however, the same court intimated that this objection did not apply to a tax on the business of a resident of the state, though the business was the negotiation of sales of property in other states. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1. Moreover, the validity of a tax on auction sales of goods brought from another state has been sustained though the goods were sold in the original packages, since the same tax was imposed on domestic goods. *Woodruff* v. *Parham*, 8 Wall. 123. This last case seems to state the sound view. A tax like that in the principal case, which is reasonable in amount and does not discriminate in favor of domestic goods, imposes no restrictions on interstate commerce, and it is difficult to believe that the commerce clause was intended to prevent such a use of the taxing power. But the test of discrimination was repudiated in the case of the tax on drummers, cited *supra*, and, while it appears not to be wholly abandoned, its scope is somewhat uncertain. Moreover, the distinction suggested in *Ficklen* v. *Shelby County Taxing District*, *supra*, indicates that the question decided in the principal case is still open in the United States Supreme Court. Accordingly, it would seem that a proper deference to the legislative authority of the state, as well as the desirability of preserving the right of appeal, should have led to a decision in favor of the tax. *The Tonnage Tax Cases*, 62 Pa. St. 286.

CONTRACTS — AGREEMENT TO ARBITRATE. — *Held*, that an agreement to submit all disputes that might arise under a contract to arbitrators for final decision is void. *Jason* v. *Wright*, 55 S. W. Rep. 202 (Ky.).

The courts usually distinguish between agreements like the present and agreements to submit questions of fact to arbitration. In the latter case the weight of authority is in favor of giving effect to the provision as a condition precedent and allowing no recovery except on the arbitration award. *Scott* v. *Avery*, 5 H. L. C. 811; *Delaware, etc. Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250. As the arbitrators are much more likely to be accurate than is the ordinary jury, it seems that the courts should give effect to all agreements which can be reasonably so construed. Where, however, as in the principal case, the agreement extends to questions of law, its effect is to deprive the courts entirely of jurisdiction in the field for which they are established, and it should therefore be held void. *Vass* v. *Wales*, 129 Mass. 38; *Dawson* v. *Fitzgerald*, 1 Exch. Div. 257. Under such an agreement, questions of fact cannot be left to the decision of arbitrators, because the contract as made covers all disputes, and this would be changing its terms without the consent of the parties.

CONTRACTS — MUTUAL PROMISES TO MARRY — STATUTE OF FRAUDS. — *Held*, that a contract of marriage is not within the clause of the Statute of Frauds which forbids actions on oral agreements not to be performed within one year. *Lewis* v. *Tapman*, 45 Atl. Rep. 459 (Md.). See NOTES.

EQUITY — CORPORATIONS — SIMILARITY OF NAMES. — The plaintiff, a membership corporation, sought to restrain a similar corporation from using a name so nearly like

its own as to cause confusion. *Held*, that the plaintiff was entitled to an injunction restraining such use. *Society of Eighteen Hundred and Twelve* v. *Society of 1812 in the State of New York*, 62 N. Y. Supp. 355 (Sup. Ct., App. Div., First Dept.). See NOTES, 13 HARV. LAW REV. 685.

EQUITY — INJUNCTIONS — STREET RAILWAYS. — *Held*, that an injunction will be granted to an abutting property owner who would suffer irreparable injury from the construction and operation of a street railroad under an alleged illegal ordinance. *General Electric Ry. Co.* v. *Chicago, etc. Ry. Co.*, 98 Fed. Rep. 907 (C. C. A., Seventh Cir.).

This case limits the scope of the rule laid down in *Doane* v. *Lake St. Elevated R. R. Co.*, 165 Ill. 510, that an abutting owner cannot enjoin the construction of a street railway illegally authorized. In that case, the court was influenced by the delay that might be caused in constructing a railway, if an injunction were to be issued at the request of any owner who could show prospective injury. In the principal case, however, the court holds that such reasoning applies only when there is an adequate remedy at law. Where an injunction would stop a work of public importance, the damage to the plaintiff should be serious. *Drake* v. *Hudson River R. R. Co.*, 7 Barb. 508. Still, if he can clearly show that money damages would be an insufficient remedy, equity ought not to hesitate to grant relief. *Keystone Bridge Co.* v. *Summers*, 13 W. Va. 476, 485.

EQUITY — SPECIFIC PERFORMANCE — PAROL CONTRACT TO CONVEY LAND. — The defendant's intestate, while suffering from an offensive disease, made an oral agreement to convey land to the plaintiff in consideration of care during the rest of his life. *Held*, that the plaintiff, having duly performed his part of the contract, was entitled to a decree for specific performance. *Lothrop* v. *Marble*, 81 N. W. Rep. 885 (S. D.). See NOTES.

EQUITY — VENDOR'S LIEN — ASSIGNMENT OF NOTES. — A vendor of real property took three notes secured by a vendor's lien in payment of the purchase price. He subsequently assigned one of the notes, retaining the others. *Held*, that the assignee's right to be paid out of the property has priority over the vendor's right on the notes retained. 55 S. W. Rep. 526 (Tex., Civ. App.).

By the weight of authority, the assignee in such cases, as well as the similar ones where several notes are secured by a single mortgage, is preferred in the absence of express agreement, on the ground that it would be inequitable to allow the assignor to compete with him. *McClintic* v. *Wise's Admrs.*, 25 Grat. 448; *Salzman* v. *Creditors*, 2 Rob. La. 241. On the other hand, some cases, among them earlier Texas decisions, deny such priority, and hold that the proceeds of the lien or mortgage should be divided *pro rata*. *Dixon* v. *Clayville*, 44 Md. 573; *Wooters* v. *Hollingsworth*, 58 Tex. 374. On principle, this position seems better, since there appears to be no reason why the assignee should be entitled to priority in cases where there is no agreement to that effect, and nothing to lead him into the belief that he will have this preference. The principal case, however, shows a tendency in Texas courts to follow the more usual rule.

PARTNERSHIP — GARNISHMENT — DEBTS DUE ONE PARTNER. — *Held*, that creditors of a firm cannot by garnishment reach a debt due to one of the partners. *Commercial Nat. Bank* v. *Kirkwood*, 56 N. E. Rep. 405 (Ill.).

This case holds that only such debts can be reached by garnishment as could be recovered by the judgment debtor himself in an action of debt or *indebitatus assumpsit*. The debt here could not be thus recovered, for it was not due the firm directly. In accord with this view, see *Siegel, Cooper & Co.* v. *Schneck*, 167 Ill. 522; *Ford* v. *Detroit Dry Docks Co.*, 50 Mich. 358. On the other hand, some courts hold that, as the property of individual partners may be taken on an execution against the firm, a debt due to one of the partners may be reached by garnishment. *Stevens* v. *Perry*, 113 Mass. 380; *Pearce* v. *Shorter*, 50 Ala. 318. The position of the principal case, however, seems preferable, since the garnishment statutes uniformly provide for reaching debts due the debtor, and here clearly the firm, and not the partner, is the debtor.

PERSONS — LIABILITY OF INFANTS FOR TORTS. — An infant obtained goods on credit by falsely representing himself to be of age. *Held*, that an action of tort will not lie. *Slayton* v. *Barry*, 56 N. E. Rep. 574 (Mass.).

This case, deciding the point for the first time in Massachusetts, follows the weight of authority. *Nash* v. *Jewett*, 61 Vt. 501; *Ferguson* v. *Bobo*, 54 Miss. 121, 131. The view taken is that, since the plaintiff has no remedy on the contract, he ought not to recover in tort, because his deceit really enters into the agreement. His success, therefore, would amount to an evasion of the law as to infants' contracts. In fact, however, the fraud, though inducing the sale, is no part of the contract, but is ante-

cedent to it, and so the infant may be held without enforcing his promise, directly or indirectly. *Fitts* v. *Hall*, 9 N. H. 441, 449; *Rice* v. *Boyer*, 108 Ind. 472. Moreover, this result is in conformity with the modern tendency to withdraw the plea of infancy where it is not required as a defence, but is employed as a weapon for purposes of fraud. Accordingly, it seems that the opposite decision in the principal case would have been preferable.

PERSONS — MARRIED WOMEN — IMPAIRMENT OF EARNING CAPACITY. — Statutes in Arkansas allow a married woman to hold property acquired in her separate business free from her husband's control, and to maintain an action in her own name for any injury to her person, character, or property. *Held*, that in an action for personal injury she may recover damages for the impairment of her earning capacity. *Texas, etc. Ry. Co.* v. *Humble*, 97 Fed. Rep. 837 (C. C. A., Eighth Cir.). See NOTES.

PROPERTY — ADVERSE POSSESSION — TACKING. — *Held*, that successive adverse possessions may be tacked so as to bar the true owner without further privity than arises out of a parol sale and transfer from one possessor to the other. *Illinois Steel Co.* v. *Bridzisz*, 81 N. W. Rep. 1027 (Wis.).

Though contrary to the spirit and letter of the Statute of Limitations, the rule requiring some form of privity between successsive adverse holders in order to allow tacking has become well settled in this country. 13 HARV. LAW REV. 52. In defining what shall constitute such privity the doctrine of the principal case has been generally adopted. *McNeely* v. *Langdon*, 22 Oh. St. 32; *Vance* v. *Wood*, 22 Oreg. 77. Some jurisdictions, however, follow more closely the strict meaning of the term, and require that there must be such a transfer as would pass a good title, if one existed. *Potts* v. *Gilbert*, 3 Wash. C. C. 475; *Ward* v. *Bartholemew*, 23 Mass. 409. But where the requirement of privity cannot be abolished entirely, the principal case should be followed, because it more nearly achieves the purpose of the statute, barring the true owner for his laches.

PROPERTY — DEDICATION OF LAND TO THE PUBLIC. — The dedicator drew up a plat of certain premises, leaving a strip along a river as a place for a public wharf. *Held*, that acceptance was necessary to complete the dedication, but that public user and repair by the municipal authorities were sufficient acceptance. *Pittsburg* v. *Epping-Carpenter Co.*, 45 Atl. Rep. 129 (Pa.). See NOTES.

PROPERTY — FIXTURES — EMINENT DOMAIN. — A railroad company bought land subject to a mortgage in a state where the legal title remains in the mortgagor. The mortgagee having foreclosed and bid in the property, the company took proceedings to have the land condemned. *Held*, that the damages should not include the value of the track and station built by the company before the foreclosure, because these improvements were trade fixtures, and therefore personal property. *St. Louis, etc. R. R. Co.* v. *Nyce*, 59 Pac. Rep. 1040 (Kan., Sup. Ct.).

The reason given for this decision appears erroneous. Trade fixtures may be removed by a tenant during his term, but for all other purposes they are real property, and are conveyed with the land. *Foote* v. *Gooch*, 96 N. C. 265. The cases cited by the court, in which similar improvements were held to be personal property, go on the very different ground that tracks, etc., built by a railroad company, claiming only an easement in the land, do not become fixtures at all, because it is not the intention to make them a permanent accession to the realty. *Justice* v. *Nesquehoning, etc. R. R. Co.*, 87 Pa. St. 28. But this reasoning, if supportable, obviously does not apply to the principal case, where the railroad had the fee when it made the improvements. The decision may, however, be supported on other grounds. By statute, the landowner is entitled to receive just compensation for all land condemned, but this amount should include only his actual loss at the hands of the company, without reference to the technical rules of property. Therefore it should not include the value of the improvements. *Greve* v. *Saint Paul, etc. R. R. Co.*, 26 Minn. 66.

PROPERTY — LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW. — A tenant from year to year agreed orally with his landlord to determine the tenancy in the middle of the ensuing term. Subsequently he refused to leave. *Held*, that the landlord may recover possession, as the tenancy from year to year was surrendered by operation of law when the oral agreement was made. *Fenner* v. *Blake*, [1900] 1 Q. B. D. 426.

It is settled that a lease to a tenant for a new term constitutes a surrender by operation of law, and is, therefore, not within the clause of the Statute of Frauds requiring surrenders of leasehold interests to be in writing. *Livingston* v. *Potts*, 16 Johns. 28; *Enyeart* v. *Davis*, 17 Neb. 228. The ground taken in the principal case is that an agreement by the tenant to leave at a certain date necessarily creates a new lease. It

is hard to see why the facts must be interpreted in this way, and a contrary conclusion was reached in *Doe d. Hudleston* v. *Johnston*, McCl. & Y. 141, and *Bussell* v. *Gaudsberry*, 7 Q. B. 638. Moreover, the decision leads to the curious result that, though a surrender *in futuro* is void, *Doe d. Morrell* v. *Milward*, 3 M. & W. 328, and an oral agreement to quit without actual change of possession is invalid, *Wallis* v. *Hands*, [1893] 2 Ch. D. 75, such an undertaking to leave in the future is nevertheless good because its legal effect is to create a new tenancy.

PROPERTY — LEGACIES — SET-OFF. — Testatrix devised her estate to be sold and the proceeds to be divided among her children, providing that all moneys owing her at her death from any child should go toward satisfaction of that child's share. One son had occupied land of testatrix under a lease for more than twelve years without payment of the rent due. *Held*, that, though the son had acquired title to the property under the Statute of Limitations and recovery of the rent was likewise barred, twelve years' rent should be deducted from his share. *Re Jolly*, [1900] 1 Ch. D. 292.

The result of this case is in accord with the English rule which allows an executor to retain from a legacy a debt due to the testator from the legatee, even though it is barred by the Statute of Limitations. *In re Akerman*, [1891] 3 Ch. D. 212; *In re Foster's Case*, 37 N. Y. Supp. 36. This rule arose, perhaps, out of the idea which the courts of equity have entertained, that it is unconscionable to plead the Statute of Limitations. Its anomalous character is shown by the refusal to extend it to claims barred by the Statute of Frauds, though no real distinction can be made between the cases. *In re Renson*, 29 Ch. D. 358. On principle it appears that such a set-off should be allowed only where the language of the will clearly shows that the testator intended such a deduction. *Allen* v. *Edwards*, 136 Mass. 138. As this is not clear in the principal case, the decision seems erroneous.

PROPERTY — REVOCATION OF LICENSE — CONTRACT TO CONVEY. — The plaintiff had a parol license to cut timber on certain land, which his licensor, without notice, entered into a contract to sell to the defendant. *Held*, that the contract revoked the license, since the licensor had no longer any right to dispose of the timber. *Bruley* v. *Garvin*, 81 N. W. Rep. 1038 (Wis.).

This seems to be the first time that this exact point has been decided. It is well settled that such a license is terminated by an absolute conveyance of the property or by the death of the licensor. *Drake* v. *Wells*, 93 Mass. 141; *Blaisdell* v. *Portsmouth, etc. R. R. Co.*, 51 N. H. 483. But it is clear that without some notice to the licensee there is nothing which can properly be called a revocation. The true reason for these decisions is that the legal title has passed to the grantee or heir, and a license from the former owner is no excuse for a trespass on the property. In giving a contract to convey the same effect as a deed, the principal case confuses what the licensor had a right to do under his contract with what he had the legal power to do. The legal title remained in him, and, though he held it only as security, the rights of the defendant are purely equitable. Therefore a sale of the land to a purchaser without notice would unquestionably have been valid; and on the same principle, as the plaintiff in good faith acted on a license from the legal owner of the property, he should be protected.

PROPERTY — WILLS — LAPSED LEGACIES. — *Held*, that a legacy given to discharge an obligation will not lapse by the death of the legatee prior to that of the testator. *Ward* v. *Bush*, 45 Atl. Rep. 534 (N. J., Ch.).

To take a case out of the rule that a legacy lapses upon the death of the legatee before the testator, ordinarily the words of the will must clearly show a contrary intention. *Toplis* v. *Baker*, 2 Cox Ch. 118. Accordingly, where the legacy is intended as a mere bounty, even the fact that it is given to a debtor or a creditor will not of itself prevent a lapse, for a purely personal benefit cannot go to a legatee's successors without a clear gift over to them. 1 Jar. Wills, *338–340; *Elliott* v. *Davenport*, 2 Vern. 521. But where, as in the principal case, the testator intends, not a bounty, but the discharge of a duty which he owes to the estate of the legatee as well as to the legatee himself, the intention not to have the legacy lapse is readily implied, even though the obligation be merely moral. *Re Sowerby's Trust*, 2 K. & J. 630; *Williamson* v. *Naylor*, 3 Y. & C. 208.

PROPERTY — WILLS — UNDUE INFLUENCE. — The testator devised the larger portion of his property to his attorney. *Held*, that there is no presumption that this devise was procured by undue influence. *In re Murphy's Will*, 62 N. Y. Supp. 785 (Sup. Ct., App. Div., First Dept.).

The decisions on the point are conflicting, but the more numerous and better considered authorities are in accord with the principal case. *Downey* v. *Murphy*, 1 Dev. & B. 82; *Herster* v. *Herster*, 116 Pa. St. 612. *Contra*, *Morris* v. *Stokes*, 21 Ga. 552, 575. It

is almost universally held that a gift *inter vivos* to one's attorney is *prima facie* void. *Greenfield's Estate*, 14 Pa. St. 506. The courts, deciding contrary to the principal case, have assimilated gifts by will to those *inter vivos*. This seems indefensible, for influence which will, at the instigation of the donor, invalidate a gift *inter vivos*, will not necessarily invalidate a devise. *Wingrove* v. *Wingrove*, L. R. 11 P. & Div. 81; *Jennings* v. *McConnell*, 17 Ill. 148. The fact that the beneficiary is an attorney may well lead to the conclusion that a gift *inter vivos* was not fairly obtained. But, since it is natural that one will leave his property to those with whom his relations are confidential, this should not affect the validity of a will.

QUASI-CONTRACTS — MONEY PAID UNDER MISTAKE. — The executor of an insolvent estate paid a creditor's claim in full, both believing that the estate was solvent. *Held*, that the executor may recover the excess above the percentage which the estate was actually worth. *Tarplee* v. *Capp*, 56 N. E. Rep. 270 (Ind.).

There is a conflict of authority on this question. Some decisions in accord with the principal case allow the executor to recover because the payment was made under an honest mistake of fact. *Wolf* v. *Beaird*, 123 Ill. 585; *Mansfield* v. *Lynch*, 59 Conn. 320. Other courts say that, though there was a mistake of fact, yet the creditor has in good faith received only the amount of his honest claim. Hence, there is nothing inequitable in his retaining it, and he should be under no quasi-contractual liability to refund. *Lawson* v. *Hansborough*, 10 B. Mon. 147; *Carson* v. *McFarland*, 2 Rawle, 118. This view, it seems, is preferable on principle.

SALES — PURCHASES FOR VALUE — ANTECEDENT DEBT. — Goods that had not been delivered were sold by the consignee to the carrier, in payment of an antecedent debt. *Held*, that the consignor can still exercise his right of stoppage *in transitu*. *Wheeling, etc. Co.* v. *Koontz*, 56 N. E. Rep. 471 (Ohio).

Stoppage *in transitu*, being an equitable right, is cut off by the transfer of the legal title to a purchaser for value without notice. *Lickbarrow* v. *Mason*, 6 East, 20. The principal case goes, therefore, on the ground that one who takes chattels in payment of an antecedent debt gives no value. This view is not without support, *Hurd* v. *Bickford*, 85 Me. 271, but the weight of authority is *contra*. *Taylor* v. *Blakelock*, 32 Ch. D. 397; *Soule* v. *Shotwell*, 52 Miss. 236. On principle, such a transferee without notice should be protected, since there is sufficient present consideration in the actual forbearance, which is the purpose of, and which is obtained by, the transfer. *Leask* v. *Scott*, 2 Q. B. D. 376. The opposite result in the principal case would, therefore, have been preferable.

SALES — STOPPAGE IN TRANSITU — RESALE BY THE VENDOR. — A vendor having stopped goods *in transitu* resold them for less than the contract price and sued for the difference. *Held*, on demurrer, that the declaration was fatally defective in not alleging notice of the resale or tender of the goods and demand of payment. *Davis Sulphur-Ore Co.* v. *Atlanta Guano Co.*, 34 S. E. Rep. 1011 (Ga.). See NOTES.

TORTS — BLASTING — ABSOLUTE LIABILITY. — A blast fired by the defendant on his own land threw a tree some four hundred feet and killed the plaintiff's intestate. *Held*, that liability attached irrespective of negligence. *Sullivan* v. *Dunham*, 55 N. E. Rep. 923 (N. Y.) See NOTES, 13 HARV. LAW REV. 600.

TORTS — CONTRIBUTORY NEGLIGENCE — LOCATION OF BUILDING. — The defendant railroad company negligently set fire to a building which the plaintiff had erected some years before partly on the defendant's right of way. *Held*, that the defendant, having impliedly licensed this occupation by the plaintiff, could not now charge him with contributory negligence. *Kansas City, etc. R. R. Co.* v. *Chamberlain*, 60 Pac. Rep. 15 (Kan., Sup. Ct.).

According to the better opinion, the presence of inflammable material on the plaintiff's land near a railroad track does not constitute contributory negligence, since the mere proximity of the railroad cannot deprive the landowner of the right to the enjoyment of his property. *Kellogg* v. *Chicago, etc. Ry. Co.*, 26 Wis. 223. This reasoning, however, does not apply to a building erected on the company's right of way. Then the plaintiff's negligence would seem to be purely a question of fact, depending on the circumstances of each case; and when the danger was equally apparent to both parties, it is hard to see how a mere license from the defendant precludes the possibility that the plaintiff was negligent. The decision can, however, be supported on the ground that, since the plaintiff's negligence was an accomplished fact and the defendant had the last chance to avoid the injury, the negligence of the defendant may be regarded as the sole legal cause of the damage. *Davies* v. *Mann*, 10 M. & W. 546; *Flynn* v. *San Francisco, etc. R. R. Co.*, 40 Cal. 14.

TORTS — LIABILITY FOR FALSE STATEMENTS — NEGLIGENCE. — The plaintiff, relying on the negligent statement of the defendant, a physician, that there was no danger, aided him in dressing a sore, and thereby became infected. *Held*, that the defendant was liable for the damage caused by his negligence. *Edwards* v. *Lamb*, 45 Atl. Rep. 480 (N. H.). See NOTES.

TORTS — NEGLIGENCE — ASSUMPTION OF RISK. — The plaintiff, while crossing a street diagonally, fell into a negligently constructed catch-basin. *Held*, that, in departing from the way provided by the city for pedestrians, he assumed the risk of what might happen to him. *Dayton* v. *Taylor's Admr.*, 56 N. E. Rep. 480 (Ohio).

The phrase, assumption of risk, is used legitimately in two classes of cases. The first is where an employee assumes all natural risks of his employment. *Sweeney* v. *Envelope Co.*, 101 N. Y. 520. The second is where an employee, who is aware of his employer's negligence, is himself negligent in not avoiding it. *Winston* v. *Churchill*, 137 Mass. 243. The expression is, however, not useful except where the relation of master and servant exists, and in the principal case there is no such relation. There, the phrase means nothing more than that the plaintiff was contributorily negligent, and simply confuses the question. For whether the plaintiff has been negligent is, in a case of any doubt, to be determined by the jury. *Grand Trunk, etc. R. R. Co.* v. *Ives*, 144 U. S. 408. The facts in the principal case are by no means so clear as to justify the court in taking this question away from the jury, yet in effect this is done by charging that the plaintiff assumed the risk. The decision, therefore, seems erroneous. See *Davis* v. *Forbes*, 171 Mass. 548, 553.

TORTS — TROVER — MEASURE OF DAMAGES. — Defendant, in good faith, bought a buggy from one who had made part payment under a conditional sale which forbade his parting with possession. *Held*, that he is liable in trover to the first vendor for the value of the buggy at the time of conversion, up to the amount due under the conditional sale. *Woods* v. *Nichols*, 45 Atl. Rep. 548 (R. I.).

Some courts hold that, since the first seller in such cases retains title, the defendant is liable for the full value of the chattel at the time of conversion. *Angier* v. *Taunton Paper Co.*, 67 Mass. 621; *Brown* v. *Haynes*, 52 Me. 578. This view is objectionable, since it allows the owner to recover more than his actual damages, and thereby overlooks the fundamental principles of compensation upon which trover is based. Other courts allow the convertor to set up, in mitigation of the plaintiff's damages, the amount paid under the conditional sale. *Meeks* v. *Simon*, 2 Misc. Rep. 241. Under this rule, the plaintiff is left to his remedy on the contract for any loss which he may incur through the depreciation of the chattel before the conversion. The same objection as before arises, however, if the chattel has increased in value since the sale, for in that case the plaintiff gets more than he has really been damaged. The position taken in the principal case avoids this difficulty, is easy of application, and reaches the desirable result. It should, therefore, be followed.

TRUSTS — MAINTENANCE OF INFANT. — The testator directed in his will that the income of his estate should be applied to his son's education, and that at a future time all the income should go to the son or his mother. There being no adequate means for the son's support, and the mother consenting, *held*, that an allowance from the income will be made for the son's maintenance. *Pitts* v. *Rhode Island, etc. Co.*, 45 Atl. Rep. 553 (R. I.).

Under proper circumstances, income may be applied to the maintenance of an infant, in the absence of, or even in opposition to, directions in the will. *Greenwell* v. *Greenwell*, 5 Ves. 195; *Stretch* v. *Watkins*, 1 Madd. 253. This is not allowed except where the parents cannot make other suitable provision for the child. *Thompson* v. *Griffin*, 1 Cr. & Ph. 317. Moreover, unless the child is the only one who has any interest in the property, the consent of all interested parties must be obtained. *Ex parte Kebble*, 11 Ves. 604; *Cavenaish* v. *Mercer*, 5 Ves. 195, n. The principal case fulfils all these requirements. Therefore, although it violates the precise terms of the will, it is supported by authority, and reaches the desirable result.

TRUSTS — TORTS OF TRUSTEE — LIABILITY OF TRUST ESTATE. — A trustee, in working a colliery for the trust estate, caused a subsidence of the plaintiff's adjoining property. *Held*, that, as the trustee was not negligent, and was therefore entitled to be indemnified, the plaintiff could obtain satisfaction of his claim against the trustee directly out of the trust estate. *Re Raybould*, [1900] 1 Ch. D. 199. See NOTES.